No. 515.

Brief of Barber for P. & E.

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Filed Feb. 28, 1898.

BRIEF FOR APPELLANTS.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1897.

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S. W. VANCE, W. N. BAHR, AND J. M. SCOTT, PLAINTIFFS IN ERROR,

vs.

W. A. VANDERCOOK COMPANY.

In Error from the Circuit Court of the United States for the District of South Carolina.

BRIEF OF WILLIAM A. BARBER,
Attorney General of South Carolina,
Counsel for Appellants.

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STATEMENT OF THE CASE.

The W. A. Vandercook Company is a corporation created by and under the laws of California, and is a citizen of that State. In February, 1897, this company shipped from California to Charleston, S. C., by railroad, a number of cases of wines and brandies, consigned to J. C. Simonds, cashier of one of the national banks of that city, with each package marked "J. C. Simonds." After the arrival of the liquors in the city of Charleston, and while in the depot of the railroad company, they were seized by one of the defendants, but subsequently released. After delivery by the railroad company to J. C. Simonds, consignee, they were again seized by the defendants, as State constables, under the Dispensary Act. None of the liquors had been inspected,

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and did not have attached to the cases the certificates required by the Dispensary Law.

This action was commenced for the recovery of the possession of the wines and liquors so seized, and damages. In the answer of the defendants, several defenses are set up: 1st. That the Court has no jurisdiction. 2d. That the complainant does not state facts sufficient to constitute a cause of action. 3d. That, under the Dispensary Law, no action of this kind can be maintained. 4th. That there is a misjoinder of causes of action in the complaint. 5th. That the seizure was lawful under the Dispensary Act, and it is a lawful exercise of the police power.

At the trial of this cause, all of the said defenses were overruled, and the Court, without a jury, rendered a judgment for the plaintiff for the personal property or its value and the sum of $1,000.

A bill of exceptions was allowed, and the questions raised by it are:

I. That the Court has no jurisdiction in this action.

II. That the plaintiff in this action is not the real party in interest.

III. That by the provisions of the Dispensary Law of South Carolina, approved March 6, 1896, no action of this kind can be maintained against the defendants as State constables.

IV. That there is a misjoinder of causes of action in the complaint.

V. That the provisions of the Dispensary Law authorizing the seizure of the liquor of the plaintiff were enacted in the lawful exercise of the police power of the State.

VI. That the provisions of the Dispensary Law requiring an inspection of all liquors imported into South Carolina were enacted in the lawful exercise of the police power.

First Proposition.

The Circuit Court had no jurisdiction in this action. This is an action for the recovery of the possession of personal property and damages under the Code of South Carolina.

The complaint, in the twelfth paragraph, page 4, Transcript of Record, alleges the value of the property sued for to be one

thousand dollars. In the same paragraph it is alleged that by reason of the wrongs stated the plaintiff has been injured to his damage ten thousand dollars.

In the ninth paragraph of the complaint, page 4, it is alleged that "the said defendants, by reason of the said malicious trespass and wrongful detention aforesaid, &c." The damages claimed are predicated upon the malicious trespass committed, and not upon the detention of the property.

The first section of Act of Copgress of August 13, 1888, is as follows: "That the Circuit Courts of the United States shall have original cognizance, concurrent with the Courts of the several States, of all suits of a civil nature at common law or in equity, when the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the Constitution and laws of the United States."

It is the well settled doctrine of this Court that the inquiry into the jurisdiction of the Circuit Court is limited to the facts appearing on the record in the first instance. In the complaint, it is alleged that the plaintiff has been damaged by the malicious trespass committed in seizing the liquors, and the prayer is for the recovery of the possession of the liquors or their value, and ten thousand dollars exemplary damages. Under the Code of South Carolina, an action for the recovery of the possession of personal property and for vindictive damages can not be sustained. Section 299 of Code of South Carolina is as follows: "In any action to recover the possession of personal property, judgment for the plaintiff may be for the possession, or for the recovery of the possession, or the value thereof, in case a delivery can not be had, and of damages for the detention. If the property has been delivered to the plaintiff, and the defendant claims a return thereof, judgment for the defendant may be for a return of the property or the value thereof, in case a return can not be had, and damages for taking and withholding same."

Section 298 is as follows: "Whenever damages are recoverable, the plaintiff may claim and recover, if he shows himself entitled thereto, any rate of damages which he might have heretofore recovered for the same cause of action."

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These sections have been considered and construed by the Supreme Court of South Carolina.

In *Joplin* v. *Carrier*, 11 S. C., 329, the Court held: "It is alleged that the judgment is erroneous, as it should have been for the return of the property, and that the value of the property should not have been included in the damages awarded, but assessed separably, so that the value would become part of the damages only in case the property was not returned. The plaintiff had a right to demand either damages for the taking and detention, as in trover for conversion, or the return of the property with damages. The Code has not changed the right of parties in this respect. The provisions of Section 301 (now 299) of the Code apply to a judgment awarding possession of personal property, not to a case where the plaintiff is entitled to general damages. It is for the plaintiff to elect which form of remedy he will pursue."

The same doctrine held in *Richey & Miller* v. *DuPre*, 20 S. C., 10.

Section 283 of Code of South Carolina is as follows: "In an action for the recovery of specific personal property, if the property have not been delivered to the plaintiff, or if it have, and the defendant, by his answer, claim a return thereof, the jury shall assess the value of the property, if their verdict be in favor of the plaintiff; or if they find in favor of the defendant, and that he is entitled to a return thereof; and may, at the same time, assess the damages, if any are claimed in the complaint or answer, which the prevailing party has sustained by reason of the detention or taking and withholding such property.

"In every action for the recovery of money only, or specific real property, the jury, in their discretion, may render a general or special verdict. In all other cases, the Court may direct the jury to find a special verdict, in writing, upon any or all of the issues; and in all cases may instruct them, if they render a general verdict, to find upon particular questions of fact, to be stated in writing, and may direct a written finding thereon. The special verdict or finding shall be filed with the Clerk and entered upon the minutes."

This section has been construed in the case of *Loeb* v. *Mann*,

39 S. C., 469. The Justice, delivering the opinion of the Court, said: "But it is urged that this action of 'claim and delivery' is peculiar in this, that the law expressly gives to the prevailing party damages in addition to costs and disbursements. It is true, that Section 283 of the Code provides as follows: 'In an action for the recovery of specific personal property, if the property have not been delivered to the plaintiff, or if it have, and the defendant, by his answer, claims a return thereof, the jury shall assess the value of the property, if their verdict be in favor of the plaintiff; or if they find in favor of the defendant, and that he is entitled to a return thereof; and may, at the same time, assess the damages, if any are claimed in the complaint or answer, which *the prevailing party has sustained by reason of the detention or taking and withholding such property*,' &c. What damages? Why, surely such damages as 'may have been sustained by reason of the seizure and detention of the property' itself; that is to say, by direct and proximate injury of the property in question, or in reducing its value, and not for the purpose of allowing a party to reimburse himself as to consequential losses alleged to have been sustained in the prosecution of the case, in respect to the speculative value of time lost, and the payment of the bills of railroads and hotels, lawyers' fees," &c.

In the case of *Sullivan* v. *Sullivan*, 20 S. C., 512, the Court held: "It is now urged that section 298 of the Code remands such cases to the former practice and limits the recovery of damages, as did the law before the new procedure. This position in the main is no doubt correct. The Code has made no material changes in the primary rights of parties, or in the causes of actions, nor has it given any new redress for wrongs perpetrated. It has only changed the mode by which such redress is reached and applied. The rights and remedies (using the term 'remedy' in the sense of 'redress') are still the same. But is the other position of appellant correct, to wit: That under the former in cases like this, the plaintiff could recover nothing except the notes, or, if they could not be delivered, then their amount and interest; so much so, as to demand that the Judge should have charged in this case that proposition as matter of law? The action below was an action for the recovery of personal property

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and damages for its detention. It was an action in the nature of the old action of trover. It will not be denied that in actions of that kind, under the former practice (as a general rule), damages for detention beyond the property itself could be and were uniformly recovered, such damages being measured by different rules, according to the character of the property and the circumstances of each case. See case of *McDowell* v. *Murdock*, 1 *Nott & McCord*, 237, where the Court said: "It has lately been determined by this Court in several cases, that a jury can not give vindictive damages in an action of trover. The value of the property, with such damages, as must necessarily be supposed to flow from the conversion, is the true measure. Such, for instance, as the work and labor of negroes; interest on the value of dead property." *Buford* v. *Fannen*, 1 *Bay* (2nd edit.), 273; *Harley* v. *Platts*, 6 Rich., 318; *Kid* v. *Mitchell*, 1 *Nott. & McCord*, 338.

In *Spellman* v. *Richmond & Danville R. R. Co.*, 35 S. C., 473, held: "Every cause of action is referable to a class and must be properly pleaded. And so, whether the damages claimed are actual or exemplary, must be stated in the complaint; and to the damages, as stated, the testimony must be confined and the jury restricted."

The damages alleged in the complaint are those arising from malicious trespass on the part of the defendants in seizing the property. No actual damages to the property are alleged or proved, and the damages stated arise consequentially, to wit: the destruction of the business of the plaintiff. This is essentially, then, an action for trover, in which the property converted is claimed and such damages as are recoverable in such actions. No damages are laid for the detention of the property, such as are recoverable under the Code. If general or exemplary damages are improperly laid, then the only amount to give jurisdiction appearing upon the face of the record, is the value of the property—one thousand dollars—which is insufficient under the Act of Congress, and the Court, therefore, it is respectfully submitted, was without jurisdiction.

Second Proposition.

It is submitted that there is a misjoinder of causes of action in the complaint, in this: that there is a cause of action for the recovery of the possession of personal property under the Code of South Carolina, and also a cause of action for general damages for the trespass committed in the seizure of the property.

See authorities as to jurisdiction, in which this question is considered.

Third Proposition.

The Dispensary Law of South Carolina, in so far as it prohibits the importation of liquors by non-resident manufacturers and dealers into the State for storing and sale, is a valid exercise of the police power.

In the case of *Donald* v. *Scott*, the only question for adjudication before the Court was the right of a citizen of South Carolina to import liquors within the State for his own personal use. The Dispensary Law was condemned in so far as its provisions prohibited this right, upon the ground of want of equality and uniformity in them. In the case at bar, the Circuit Judge has based his decision that a non-resident dealer or manufacturer has the right to import into the State and store for sale intoxicating liquors in original packages, upon the case of *Donald* v. *Scott*. In that case, the doctrine was enunciated that any statute of a State which prohibits the use of liquors as a beverage and allows the sale of same as such, or which prohibits the use and sale of anything but pure liquors, to be ascertained by analysis, provided for in a valid inspection law, was the lawful exercise of the police power, and came within the operation of the Wilson Act. The theory is, that since the passage of the Wilson Act, when the use and sale of liquors as a beverage are prohibited, it takes intoxicating liquors out of the category of commercial articles; or when only pure liquors are allowed to be used and sold as a beverage, it does not take liquor out of such category, but allows the State, in the exercise of police power, to regulate to this extent the use and sale of them after their arrival in the State. In the one case, the article being taken out of commerce, can not be brought into the State at all, while

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in the other, the article may be imported into the State as an article of commerce, but immediately upon its arrival becomes subject to the laws enacted in the exercise of the police power. The effect of the Wilson Act, then, is to add nothing to the police power of the States, but is simply an exercise of the commercial power by Congress, so far as intoxicatingl iquors are concerned, which either takes them out of the category of commercial articles or allows regulation of them, dependent upon the legislative action of the States, taken in the lawful exercise of the police power. If, then, a State does not prohibit the use and sale of liquors as a beverage, but regulates their use and sale upon arrival, the Wilson Act operates, provided there is no discrimination against the citizens and products of other States. But the theory of the Circuit Judge is that nothing but an Act prohibiting the use and sale of liquors as a beverage will fall within the domain of the police power and come within the Wilson Act. This is clearly in conflict with the doctrine held by this Court in *Donald* v. *Scott*. That there are no discriminations in the Dispensary Act of South Carolina against citizens or products of other States is manifest from an inspection of the Act. There is equality and uniformity in all of its provisions. So, then, the Wilson Act is operative and the provisions of the law prohibiting the importation of liquors into the State to be sold in original packages are a lawful exercise of the police power. To hold that only prohibition makes the Wilson Act operative is to give that Act a strained and narrow construction utterly at variance with its intended object. Such a construction renders it useless, as the experience of this country is that prohibition does not prohibit, and is tantamount to a proclamation that the sale of liquor may be free and untrammeled.

For authorities, see brief of argument in Equity case between these parties, No. 514.

BRYAN PTG. CO., COLUMBIA, S. C. 17630